IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 480.

HUMES, PLAINTIFF IN ERROR.

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF FOR PLAINTIFF IN ERROR, In Reply to Brief for the Prosecution.

STATEMENT.

Plaintiff in error was tried at the November term, 1895, of the above-mentioned court, and a verdict of guilty returned.

The indictment contains nine counts, and was drawn under section 5485, R. S.

The jury returned a verdict of guilty as to the first and third counts, a verdict of not guilty as to the second, fourth, seventh, eighth and ninth counts, and a nolle pros. was entered by the district attorney on the fifth and sixth counts.

So, the matters for the decision of the court here are confined to the first and third counts, upon which a verdict of guilty was returned in the court below.

But the whole record, we most respectfully submit and insist, is here for the consideration of this court in the proper determination of the matters herein involved, because a careful review of and the deliberate consideration which we feel sure this court will give to the whole of the record, and for which we humbly pray, will show the entire correctness of the errors upon which we so earnestly insist and submit here.

The first count is in the words as stated, as to Wm. Anderson, in withholding $486.40.

The third was as to Bloodson, in the same words, as to $517.20.

[The italicising of words in the brief is usually ours.]

POINTS AND ARGUMENT.

Learned counsel for the prosecution in his brief, at the bottom of page 5 and top of the 6th page, says this:

"*There were only two issues of fact for the jury. The first was "whether Humes was the agent or attorney for the pensioners named, "or was instrumental in prosecuting the claims for pensions?*"

"*And, if the jury should find that he occupied either relation to the "pensioner and his claim,*

"*Then the second issue was whether he wrongfully withheld from "the pensioner the whole or any part of the pension allowed and due "the pensioner before it reached the hands of the pensioner?*

"*There was ample evidence to go to the jury upon both these issues, "as will be ascertained by an examination of the record.*"

And at the bottom of page 7 and top of page 8 in his brief he says this:

"*The attention of the court is called to these parts of the evidence to "show that there was evidence sufficient to go to the jury upon the issue "of fact as to whether Humes was the agent or attorney of the pension-"ers, or was instrumental in prosecuting the claims for pensions, and "it was for the jury, after hearing the witnesses, observing their man-"ner and demeanor upon the stand, and considering all the circum-"stances, to say whether or not, as a fact, Humes had been instru-"mental in prosecuting these claims for pensions, or any of them.*

"When this fact was established to the satisfaction of the "jury, then the remaining issue was to be considered, namely, "whether Humes wrongfully withheld from these pensioners, "or any one of them, any part of the pension allowed and due

"such pensioners before it reached the hands of the pensioner."

These two statements of the learned counsel in his brief, state our contention exactly, and about the whole of our contention.

It was the failure and refusal to so charge the jury, which is our third assignment of error, which counsel, on pages 2, 3 and 4, say is properly here, and which the trial judge refused to give.

We might agree, too, with the statement of counsel for the prosecution that there may have been ample evidence to go to the jury on both of these issues, for the sake of examining this part of the charge.

And we may as well say here that we consider this, and have all along, as raising one of the main questions in the case for review, and upon which we do not think there is any doubt of the right of reversal of the case for a new trial.

In our original brief herein we urged it all we could possibly think of, along with our argument on the second assignment of error. And if there is any choice in the way the trial court committed the error—whether charging the law wrong, as he did, or failing to correctly charge it, as he refused to do—to this extent we may defer to the counsel for the prosecution. He undertakes to answer this error of which we complain so much and at such great length in the original brief, by quoting from the words of the charge by the trial court.

But counsel for the Government has failed to quote *all* that was said by the trial judge on this question, because, if the words alone of the trial court on this question do not show error, when considered in the light of the repeated decisions of this court on the very point there made, then we are forced to confess we are unable to see it.

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Counsel for the prosecution in his brief on page 3 undertakes to quote the language of the trial court in his charge as found on page 175 of the record and undertaking to quote that language puts this:

"Now, with these general observations that are applicable and will be kept in mind by you throughout in this case, we come to the testimony in the case, and in respect to that it appears from the statute, as you have observed, that it is necessary in order to make the case against the defendant:

"First. That he must have been the agent or attorney of the pensioner, or he must have been instrumental in the prosecution of the pension claim, before he falls within the category of the persons who are subject to the provisions of the statute; and

"Second. He must withhold from the pensioner all or a part of what was due the pensioner claimant.

"So that two propositions are necessary to be established:

"That the defendant was an agent or instrumental in the prosecution of the claim, and secondly, that he withheld from the pensioner money that belonged to the pensioner, some part of the pension that was *allowed*" (not due, as held in Ballew case).

And we agree with counsel for the prosecution, that if this had been all the trial court said to the jury in his charge on this point, then there would in truth be nothing in our third assignment of error, as his argument in his brief on this point would be an answer to it But the trial court in its charge right there in the same sentence goes on and says:

"*Now, desiring to get the jury down to the real issue in this case as it comes to you*, leaving the jury free to find for itself, the court is of opinion that, considered in referrence to either the Government's proof or the defendant's, and with reference to the written evidence or the oral,

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"*That the defendant was instrumental in the prosecution of these claims in such sense as that if he withheld the money he would be within the provision of the statute and guilty.*

"*That brings you to the fact, then, of whether or not he did withhold these pension claims.*"

This was error, because it took from the jury all consideration of the evidence tending to show that the defendant was neither the attorney, agent, or person instrumental in procuring or prosecuting the pension claim of either Anderson or Bloodson. This being a question of fact, as to whether the defendant was or was not such agent, attorney, or person procuring said pension money, it was the province of the jury and their duty to determine such fact for themselves from the evidence, and the court could not instruct them upon this as matter of law.

Again the trial court says: "*That is the real issue,*"

"In respect to this Anderson transaction,"

"*Viz.: Who got the proceeds of that check?*"

"*If Mr. Humes got and retained the proceeds, or retained any part of it above the notary's fee, then he is guilty; whereas if Anderson got it, that is the end of the case so far as that count is concerned; or if, under the rule stated, you have a reasonable doubt about how that is, the defendant is entitled to an acquittal.*"—R., p. 176.

Again he says: "*So that did he withhold from Anderson all or any substantial part of that pension?*"—R., p. 178.

"*If so, he is guilty, and you should convict him: and if not, or if you have a reasonable doubt, acquit him.*"

Thus it is seen the trial court usurped and invaded the province of the jury in his charge, in that nine separate times he withdrew from them the finding and consideration of what he himself first charged was the primary fact, that they themselves

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must first find, as a condition precedent, before there could be any conviction: i. e., that the defendant "*must have been instrumental in the prosecution of the pension claim before he falls within the category of the persons who are subject to the provisions of the statute.*"

Twice the court stated to the jury fairly what they must find as a condition precedent before they could convict.

He says: "*It appears from the statute, as you have observed, that it is necessary, in order to make the case against the defendant. first, that he must have been the agent or attorney of the pensioner, or he must have been instrumental in the prosecution, etc.; and second, if he was, he must withhold, etc.*"

And he reiterates it: "*So that two propositions are necessary to be established.*"

And he repeats what they are again. He emphasizes it for the second time:

"*That defendant was an agent or instrumental in the prosecutim of the claim; and secondly, that if he was, he must withhold, etc.*"

Who found this primary fact that it was charged the jury must find as a condition precedent before there could be any conviction? The trial court; and so stated to the jury.

It may be suggested that in the first part of the charge the court used the words, "*leaving the jury free to find for itself, the court is of opinion that, etc.*"

In the very next breath, where he repeats that charge, does he say again, "*leaving the jury free to find for itself, the court is of opinion etc.*" *No. There is no even apparent limit on his charge this time.* He says, "*That brings you to the fact then, of whether or not he did withhold these pension claims.*"

What has become of the primary fact that he told the jury they must first find as a condition precedent before there could

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be any conviction? What is it "*that brings you to the fact, then, of whether or not he did withhold these pension claims.?*"

It was that the trial court had found the primary issue of fact—condition precedent for them which he at first had twice submitted to them, and he so charged them what it was, i. e., that defendant was instrumental in the prosecution of these claims in such sense as that if he withheld the money he would be within the provisions of the statute and guilty.

Next he says, "*and that is the real issue.*"

There is no even apparent limit on these words. He does not tell them this time, " leaving the jury free to find for itself, the court is of opinion," etc.

He tells them, "*and that is the real issue.*"

What has become of the primary other real issue—condition precedent—that he himself had twice charged them before, they themselves must first find before there could be any conviction?

He himself has found for them what that primary fact—condition precedent to any conviction—was, many times before and afterwards.

And for the fourth time, as if to clinch it, he charges them:

"If Mr. Humes got and retained the proceeds, or retained any part of it above the notary's fee."

What, then, is the only sole and solitary condition upon which he puts the case to them on? "*—then he is guilty.*

This time, does the trial court leave it to the jury to find whether or not the defendant belonged to that class of persons who would be within the provisions of the statute, and his guilt or innocence depend primarily on that as a condition precedent to their right to convict him? No. The trial court

has long since in his charge, three distinct times, passed that issue of fact, by finding it himself and so charging the jury, and now he tells them if Mr. Humes retained it, he is guilty.

The trial court has changed it—defendant's guilt or innocence now rests with them alone on the solitary issue of fact as to whether or not he retained it.

Does the trial court tell them this time, "leaving the jury free to find for itself, the court is of opinion?" No. Leaving out of consideration all things else, he says if Mr. Humes retained it, he is guilty.

He says next: "Whereas, if Anderson got it, that is the end of the case, so far as that count is concerned."

"Or if, under the rule stated, you have a reasonable doubt about how that is, the defendant is entitled to an acquittal."

Do these two charges look much like leaving the jury free to find for itself, or that the trial court could be much of the opinion that the jury were left free to find for itself whether or not the defendant was instrumental in prosecuting these claims for pensions before the Pension Office?

Again he says:

"*So that did he withhold from Anderson all or any substantial part of that pension?*

"*If so, he is guilty, and you should convict him.*"

"*If not, or you have a reasonable doubt, acquit him.*"

Do these three charges look much like the jury were left free to find for itself, or that the court was simply expressing an opinion as to whether the defendant was instrumental or not in prosecuting these claims for pension before the Pension Office?

Could language be plainer, showing that the court had time and time again in his charge taken away from them all con-

sideration of such fact, and had time and time again so charged them?

In fact, there was no limit upon the charge, and if one was intended it is strange indeed that so many times the limiting words should have been omitted altogether.

If you examine the charge again you will readily see the plain meaning of it was to the jury this: I charge you that, taking all the evidence in consideration, both the Government's and the defendant's, written and oral, the defendant was instrumental in prosecuting these claims for pension in such sense that if he withheld the money he would be within the provisions of the statute and guilty.

If the trial court intended to leave the jury free to find for itself, and simply to express his opinion, that is reversible error under the repeated decisions of this court, cited beyond, where it is the finding of the primary fact.

But the use of the expression, "leaving the jury free to find for itself, the court is of opinion," is a meaningless nothing when called a limitation on a charge where the judge told the jury that from all the evidence, the Government's and defendant's, written and oral, the defendant was instrumental in prosecuting these claims in such sense that if he withheld the money he would be within the provisions of the statute, and guilty.

His reference to it as both the Government's proof and defendant's, written and oral, but fixed it more firmly in the minds of the jury as settling the primary fact by the judge in his charge to them. After stating it in such unqualified terms, if he had said a thousand times, "leaving the jury free to find for itself, the court is of the opinion," etc., how was it possible

for him to have effaced from their minds the fixed fact as he had stated to them he had found it?

In Starr vs. U.S., 153 U.S.,626, this court, by Mr. Chief Justice Fuller, called attention to the fact that there were limitations on the power of a Federal court in commenting on the facts of a case, when instructing the jury—*limitations inherent in and implied from the very nature of the judicial office.*

In Reynolds vs. U. S., 98 ib., 168, this court, by Mr. Chief Justice Waite, also said on the same subject: "Every appeal by the court to the passions or prejudice should be promptly rebuked, and *it is the imperative duty of the reviewing court to take great care that wrong is not done in this way.* * * * "

In History vs. U.S., 160 ib., 425, this court says: Admonished by the duty resting on us in this regard, we feel obliged to say that the charge which we have been considering *crosses the line which separates the impartial exercise of the judicial function from the region of partisanship, where reason is disturbed, passions excited, and prejudices necessarily called into play.*"

The court in the case at bar first stated the true rule of law to the jury: That, as a condition precedent to conviction, they must find as a fact that the defendant was the agent, attorney or any other person instrumental in prosecuting these claims for pension before the Pension Office.

The defendant could not be within the statute and punished for a violation of law, if he violated it, unless the jury first found that he belonged to this class. Yet in the face of so plain a law the judge finds this fact for them.

If he intended to leave the jury free to find for itself, and only to express an opinion to which they should pay not the least bit of heed in the world, why did he tell them:

" *Now, desiring to get the jury down to the real issue in this case?*"

Why, he himself had twice before charged them that there were

two real issues in this case.

If he intended to leave to them the finding of the

two real issues in this case,

why did he tell them :

" *Now, desiring to get the jury down to the real issue in this case?*"

What had he done with the

other real issue in this case?

If he intended to leave the jury free to find for itself, why in his very next breath did he say :

" *That brings you to the fact, then, of whether or not he did withhold these pension claims?*"

What has the judge in this part of his charge done with

the other real issue in this case?

Then he says:

" *and that is the real issue.*"

Why, we are told he intended to leave the jury free to find for itself.

If so, what has he done with the

other real issue in this case?

If he intended to leave the jury free to find for itself, why did he say next, " If Mr. Humes got and retained the proceeds, or retained any part of it above the notary's fee, then he is guilty."

What did the judge do with the

other real issue in this case?

The trial judge in his charge to the jury starts out by telling them that there are these two issues for them (the jury) to find

as facts. And if he had let them alone on this point, we would have nothing to say.

But he refused to let them find or even consider the first fact.

He goes right on, and in the very same breath says:

"Now, desiring to get the jury down to the real issue in this case, I say to you that the defendant was instrumental in the prosecution of these claims in such sense that if he withheld the money he would be within the provisions of the statute, and guilty."

Then he says:

"That brings you to the fact, then, of whether or not he did withhold these pension claims."

Where, now, is the first issue of fact that learned counsel for the prosecution say should have been left to the jury to find as a fact. The trial judge himself has found it—what that issue of fact was—and so charged the jury what it was.

And this is the error of which we complain.

If he had not told them the plaintiff in error was guilty on the first fact they would have told him, as they had done—not guilty on the second issue of fact.

Learned counsel for the prosecution says:

"And if the jury should find that he (Humes) occupied either relation, then the second issue was whether he wrongfully withheld."

This is so.

But after the trial judge had told the jury how to find the first issue of fact it left them no show to find anything about the second, except to return a verdict of guilty, as the trial judge in effect told them to do.

Learned counsel for the prosecution in his brief, p. 8, says: "there was evidence sufficient to go to the jury upon the issue of fact as to whether Humes was the agent or attorney or instrumental in prosecuting the claims for pensions, and it was for the jury, after hearing the witnesses, etc., to say whether or not as a fact Humes had been instrumental in prosecuting these claims for pension."

Learned counsel for the prosecution, we may concede you are right about this.

And the question we ask is why did not the trial court allow the jury to do so. This is the error of which we complain.

Learned counsel for the prosecution then says, p 8:

"When this fact was established to the satisfaction of the jury, then the remaining issue was to be considered, namely, whether Humes wrongfully withheld from these pensioners, etc."

We heartily and fully agree to this, and the soundness of the same.

Learned counsel for the prosecution, on p. 6 of his brief, rather argues that the proof showed Humes was the agent and the attorney of the parties, and instrumental in the prosecution of their pension claims as such.

We are at least glad to see learned counsel take this position, because it shows the different representatives of the government in this case take different views of the facts.

The trial judge said it was not (as it was not) so much as contended even in argument by the government that Humes was either the agent or the attorney of any of these parties, but only that he was instrumental.

From the brief, we judge learned counsel's argument here is that the facts show Humes was all three.

Learned counsel, on p. 7 of his brief, says Deaderick was the attorney.

Learned counsel has evidently gotten a little mixed on the facts here. But we do not want to add any to his confusion, or confound him more than he is already, because we know it comes from the large record and brief we have been compelled to impose upon the court and him.

The lawyer first was named Dederick, W. W. He is now in the pension office at Washington. He was succeeded by Powers & Chiles, the attorneys whom this record shows got the fees in these cases.

The man Deaderick was the son of the once Chief Justice of our State Supreme Court. This man was all along the clerk of these other three, but he never was the lawyer of any of them. He died at Chattanooga in February, 1895.

In concluding this, we beg to say that nothing better shows that all the assignments of error made by the plaintiff here are well taken, and should be allowed and sustained, and that the trial court erred in not, in a fair and impartial way, leaving all the facts to the untrammelled determination of the jury, than the brief of the learned counsel for the prosecution in this case. Seven pages of his eleven-page brief he devotes to his statement and view and claim of the facts. And he even claims those facts show what the trial judge and the district attorney both below did not even claim or contend in argument that they showed. They admitted both of them that they showed exactly the opposite of what learned counsel here contends.

We have cited page after page of the facts, as we claim they show the verdict was against the weight of the evidence.

That, on the law as well as the facts, the trial judge should have charged the jury to find the defendant not guilty.

Then, how else can we settle our cross contentions except we leave them to the jury on proper instructions by the court.

Compare for a moment what the trial judge says in his charge, where he states to the jury, as a fact, that Humes was instrumental in prosecuting these claims for pension.

Never after he says this to the jury, in his long ten-page printed charge, does he mention it again, or refer to it, or comment on a single word of all the proof bearing on this question of fact.

Now, compare this with the brief of learned counsel for the prosecution, and you will see that seven out of the eleven printed pages of his brief are devoted to the evidence shown in the record on this issue of fact.

Can anything demonstrate more plainly than this that the trial judge in truth withdrew, and erred in withdrawing, from the jury altogether this issue of fact?

We have tried in our original brief to state the case, law and facts, all fully, and we must confess we rather looked for learned counsel for the prosecution, even in his short brief, to state fully what was said on both sides.

We should have been glad to see what answer he had to make to the expressions of the trial judge, "now you have that conflict in the evidence;" and the conflict is hopeless he tells the jury. And if so, what could counsel say in justification of it? Could it be claimed that such evidence as this, that was

involved in hopeless conflict could show guilt beyond a reasonable doubt? Could it overturn the legal presumption of innocence, the witness of the law that stood for the accused until overturned by proof carrying home conviction, short only of absolute certainty?

We are sorry counsel did not mention that the bank records, the vouchers, the checks, and the bank teller testified, with several other witnesses, that [illegible] Anderson and Bloodson paid the money on these checks.

How can these plain contradictions by the witnesses of the prosecution, of themselves and each other, be settled.

How is it answered, that a jury has once found, as a fact, that Humes was not the agent, attorney, or any other person instrumental, of Anderson or Bloodson, and did not withhold from them, or each of them, these specified sums of money, or any parts thereof? And if once acquited of the charge, how can he be again or twice tried?

But we ask that the original brief be considered, as it covers fully all these and the other vital questions in the case. And we can add nothing else to what we have already said on this point, unless we should just simply reprint our original brief from pages 2 to 9 and 23 to 56, inclusive, which is the argument on this point, with the authorities there cited, and on which, if counsel for the prosecution had even attempted any answer to, we should have nothing further to say.

But we respectfully submit that his brief overlooks this vital part, and real point and argument and error, as shown in and by the record, and the charge of the trial court and the repeated decisions of this court, holding that such a charge was manifest error, and reversible error, and error prejudicial to the rights

of the defendant in the court below (plaintiff in error here.)

We do not pretend to say that there is any error in that part of the charge copied in the brief by learned counsel for the prosecution on page 3.

Indeed we fully agree that in this part copied by him in his brief there is no error at all. And if alone as there given, the verdict would have been, as on the others, not guilty. But in that part of the charge which is not copied in his brief, and which is all part of the same charge on the same point, there is error too manifest to speak of. And to charge as a fact, as it was given, is unquestionably reversible error. It is readily seen by simply reading the words of the same. And to refuse to give in charge this question as requested is surely reversible error.

And when the charge in full is considered, it answers completely the argument counsel for the prosecution has made in his brief against it.

Then he says, when a jury has been properly instructed.

We don't gainsay this proposition at all, but the whole of our argument in the former brief shows, we most respectfully submit, that the jury has not been properly instructed—has been improperly instructed.

Again he says a trial court may use its own language, *so long as the correct rule* upon the subject requested be given by the court.

This is true; but so long as the correct rule of law upon the subject requested be not given by the court, it cannot use its own language, and if it does, it is reversible error. The incorrect rule of law cannot be properly given.

Again he says: "It is sufficient that the court gave no erroneous instruction." This is the true rule of law, but if it is shown that the court did give erroneous instructions then the rule is just exactly the opposite.

II.

Counsel for the prosecution rests his position in his brief, p. 2, wholly and solely on a purely a technical objection.

It is not to the merits of the position of the plaintiff in error that he objects. He does not controvert or dispute them. It is not that the decisions of this court on the points stated do not fully sustain them. It is not that the errors assigned are not well taken and that there is not real and true error committed by the trial court in the assignments of error as made. His sole and single plea is that he appeals to this court not to consider or pass upon the real and true merits of the questions of law and fact in this case.

His position is that for the thirteen assignments of error except the third, all based upon the judge's charge to the jury and his refusal to properly charge, the record fails to show that strict technical exceptions were taken and noted as a foundation for these assignments of error.

To this we cannot assent. He in his brief does not object because there is not a proper bill of exceptions in this case. And indeed he could not, for there is a bill of exceptions made making everything in the record properly a part of it by that bill of exceptions. It shows it contains all the evidence offered in the case, even the affidavits used on the motion for a new trial. It shows that they are all properly made parts of the record by a bill of exceptions.

To the action of the court at the trial of refusing to give the requests asked and in not correcting the errors complained of in the charge as given, and so overruling them in the written motion in arrest of judgment, the defendant again excepted and tendered this, his bill of exceptions, seeking to show the whole proceedings, which is signed, sealed and made a part of the record, the same having been prepared, as it stipulates, in the presence of counsel for the Government and of counsel for the defendant.

These written exceptions and objections to the parts of the charge as specifically pointed out, and to those specifically pointed out which the trial court would not consider or give, but overruled, do not bear at their head the technical word "exception," but the words used are "statement of grounds." Counsel for plaintiff in error did not take the trial judge's charge to the jury and write on it the words, this part is excepted to and that part is excepted to, and conclude each with the words "to this ruling of the court Humes then and there excepted," but filed his written exceptions and objections to the same, and they are part of the bill of exceptions.

What is the purpose of exceptions? All that is ever required is to point out to the trial judge the specific parts of his charge to which the party excepts and objects, and to specifically state what it is he wishes the trial court to charge the jury or give in his charge to the jury as the correct construction as the party contends. This was certainly done as to every one of the thirteen assignments of error herein, by a written statement setting out each one. Not only were they specifically objected and excepted to, but on the motion in arrest of judgment these very thirteen exceptions and objec-

tions, in the exact words of the assignments of error, were again set forth in writing, and these are made a part of the record properly so in this case, by the bill of exceptions, and the trial judge, on the motion in arrest of judgment, takes up seriatim each one of the thirteen exceptions and objections to the charge as given and refused to be given, and states his reasons in writing why the exceptions and objections were disallowed and overruled by him. R., p. 15. And each part of the charge in its very words was specifically pointed out in writing to the trial judge, to which objection was made and exception taken, as to what he charged and failed and refused to charge or to even consider as proper for his charge, even on the motion in arrest of judgment. And this the record, too, clearly shows in three separate and distinct ways, written papers to be now brought in question.

1. By the exceptions taken to the charge and reserved on the motion in arrest of judgment, both of what was error in the charge given and error in failing to give in the charge.

2. By the trial judge's disposition in writing of each of the same; and

3. By the written assignment of error, made part of the record with the bill of exceptions at the same time.

Each of the three being written in exactly the same words. But the position of counsel for the prosecution is that the assignments are not technically—strictly speaking—of or properly made as above stated. And at last we must turn to the decisions of this court to fix the rule and see what it is.

In Allis vs. United States, 155 U. S. 122, this court by Mr. Justice Brewer says:

"A party must make every reasonable effort to secure from

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the trial court correct rulings, or such at least as are satisfactory to him before he will be permitted to ask any review by the appelate tribunal, and to that end he must be distinct and specific in his objections and exceptions. Rule 4 of this court provides the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law and those only shall be inserted in the bill of exceptions and allowed by the court."

Justice itself, and fairness to the court which makes the rulings complained of, require that the attention of the court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception. 2 Wall, 329.

If it was intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed. 111 U. S., 337.

An exception to all and each part of the charge gave no information whatever as to what was in the mind of the excepting party, and therefore gave no opportunity to the trial court to correct any error committed by it. 140 U. S., 238, 120 U. S., 183, 130 U. S., 611, 132 U. S., 172.

In Agnew vs. United States, 165 U. S., 52, this court, speaking by Mr. Chief Justice Fuller, in commenting on the Coffin case as to the presumption of innocence, says: "*But in that case the charge of the court was thought not to have given effect to the presumption of innocence.*"

That is one of our instances in the case at bar.

The trial court did not give effect to the presumption of innocence in what it said, as the law requires it to do.

This court in the Agnew case says further: "*We have carefully explored the evidence* and considered the errors assigned, whether pressed in argument or not. P. 57.

"Nineteen errors were assigned, of which the 3d, 5th, 9th and 14th were abandoned, and the 6th, 7th, 12th, 16th, 17th, 11th and 15th were argued by counsel for plaintiff in error together." P. 42.

This court, speaking by Mr. Justice Brewer, says, as it is a criminal case, "*we will carefully examine the record with all the assignments of error, in order to see that no injustice has been done the defendant.*" Davis vs. United States, 165 U. S., 375.

In Acres vs. U. S., 164 U. S., 390, this court, speaking by Mr. Justice Brewer, say: "It may be premised that the exceptions to this charge are taken in the careless way which prevails in the western districts of Arkansas. But passing this, and considering the charge as properly excepted to," etc.

And so with the case at bar, counsel for plaintiff in error might confess the same, or that the exceptions were here through main strength and awkwardness, but still they are here, we submit, for the proper consideration of this court.

In Allen vs. U. S., 164, U. S., 494 this court, speaking by Mr. Justice Brown, says: "The learned judge was stating in this connection the theory of the prosecution, *and if the facts were as stated by the Erves boys, there was no error in saying to the jury, not that they were bound to, but that they were at liberty to infer, &c.*

"*It is misleading for a court to charge a jury,*" *&c.*

In Starr vs. U. S., 164 U. S., 631, this court, by Mr. Justice White, says: "The instruction given by the trial judge to

the jury upon the inferences to be drawn by them was specifically objected to, and the objection was duly reserved.

In Wiborg vs. U. S., 163 U. S., 656, this court, by Mr. Chief Justice Fuller, says: "This statement was based on uncontradicted testimony, and occurring as it did, in a recapitulation of the evidence, *no rule of law being incorrectly stated, and the matters of fact being specifically submitted to the determination of the jury.*"

And quoting further from the charge to the jury of the trial court, with approval, this:

"*The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only.*"

Then this court says:

"Clearly, the *observation of the court thus guarded, did not trespass on the province of the jury as to constitute reversible error.*" 142 U. S., 155.

And again this is quoted with approval from the charge of the trial court to the jury:

"*You must judge.*"

And then this court says:

"Nor was any exception taken, although they are now assigned for error. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it, (p. 658) and that we may properly take notice of what we believe to be plain error, although it was not duly excepted to.—p. 659. We are of opinion that adequate proof to that effect is not shown by the record, and that as the case

stood, the jury should have been instructed to acquit them (p. 660), and after subjecting the correctness of the rulings of the court below to that careful examination which the discharge of our duty requires."

In Stevenson vs. U. S., 162 U. S., 315, this court, by Mr. Justice Peckham, says:

"A review of the evidence at the trial of the defendant (plaintiff in error) in the court below shows that there was error in the refusal of the court of the request of the defendant's counsel to submit the question to the jury."

In Logan vs. United States, 144 U. S., 282, this court, speaking by Mr. Justice Gray, says:

"But the motion in this case appears to have been intended and understood to include an exception. And the same question is distinctly presented by the judge's refusal to instruct the jury as requested and by the instructions given by him to the jury."

In the Railroad vs. Winter, 143 U. S., this court, by Mr. Justice Lamar, says: "It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence," etc.

In Hickory vs. United States, 160 U. S., 413, this court, by Mr. Justice White, says:

"It is contended by the defendant in error that of these assignments the 4th and 7th are not sufficiently specific to merit consideration, because they do not point out the exact words in the charge of the court complained of. The assignments are in exactly the same language as were the exceptions taken during the trial and which the record declares the de-

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fendant presented at the time; that the assignments do not in terms state the precise language used by the court, they yet indicate the subject matter in the charge to which the exceptions relate with sufficient clearness to enable us, from a mere inspection of the charge, to ascertain the particular matter referred to. In considering, when this case was previously before us, a similar objection to the adequacy of an exception, we said: 'The rule in relation to the exceptions to instructions is that the matter excepted to shall be so brought to the attention of the court before the retirement of the jury as to enable the judge to correct error, if there be any, in his instructions to them, and this is also requisite in order that the appellate tribunal may pass upon the question raised without being compelled to read the record to ascertain it. It is here unquestionably on the very face of the bill of exceptions that the objections were reserved, * * * * * * * and that the trial court was fully aware of their import and had the opportunity to make such correction, if any, as its judgment may have deemed necessary to prevent the charge from being misunderstood by the jury. This is made clear not only by the language of the bill of exceptions, but also by the charge itself, which contains a statement by the court, entirely inconsistent with a possibility of there having been any surprise or misconception."

Same case, 151 U. S. 316, this court, by Mr. Chief Justice Fuller, says:

"The trial judge could not have been in doubt as to the particular part of the charge objected to, and, as his attention was called to the matter, * * * * could have modified or withdrawn it, if he had thought it necessary to do so, and the

portion excepted to is indicated with sufficient precision, so far as this court is concerned.

"Nor did the exception embrace other than the specified statements objected to.

"Again, the exception was not to the omission of the court to charge upon a particular point, in which case, in the absence of requests that that should be done, it would not have been well taken, R. R. vs. Polk, ante 73, although even in that view the exception might be held equivalent to a request for the qualification, but the objection really was to the giving of the instructions unqualified, and counsel signified out of abundant caution what in their judgment would remove their ground of complaint. We hold, therefore, that the point was sufficiently saved."

The bill of exceptions in the case at bar preserves the whole charges.

It contains all the evidence. It shows all the exceptions taken and written down, even that plaintiff in error took exceptions to the evidence throughout and sought to reserve his exceptions to the action of the trial court on the same.

In Theide vs. Utah, 159 U. S., 521, this court, by Mr. Justice Brewer, says:

"One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so."

The exceptions in the case at bar were taken at the trial. They are written out and embodied in a formal bill of excep-

tions presented to the judge at the same time; allowed and signed by the judge and filed with the clerk during the same term. The bill of exceptions was reasonably drawn up and tendered. It states in writing distinctly the rulings complained of and the exceptions taken, and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed.

These essentials we take from the opinion of this court through Mr. Justice Gray in Bank vs. Eldred, 143 U. S., 298.

So far as we can learn, by much studying and investigation, no set form of words is necessary. That you pointed out to the trial court the specific parts of the charge that you insist are erroneous, and state the specific errors you claim the trial judge made in refusing to charge as you asked him, and all this in writing, and get him to rule in writing on the same, and then embrace the result of that in a proper bill of exceptions, signed by him, so this court can see what the errors are which you specify, then that fixes it. That is all the law requires so far as we can learn. You don't have to call them by a technical name to get the benefit in full of them. There is no particular place in the record that they must be put to make them valid, so far as we can learn.

On the motion in arrest of judgment plaintiff in error presented affidavits showing newly discovered evidence.

The trial court held in writing these affidavits were merely cumulative evidence. To this ruling of the trial judge, that this was merely cumulative evidence, plaintiff in error then and there excepted in writing, and we surely submit that if this court concludes that was error—that it was independent evidence to which plaintiff was entitled to the full benefit, and

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that the trial court erred in not arresting the judgment and giving plaintiff the benefit of it then—we surely submit this court will reverse and remand the case on that ground.

The trial judge says in writing, as to the first ground assigned as an objection to the charge, he does not think it is well taken, and overrules that objection, going on to state his various reasons, which were excepted to in writing by plaintiff in error.

As to the second assignment of error, the trial court seeks to justify as right what he said in the charge there, by a written opinion. This was excepted to in writing.

The third assignment of error counsel for the prosecution says is properly here for consideration by this court.

The fourth assignment of error the trial judge seeks in his written opinion to justify and sustain as being right and without error.

The fourth, counsel for the prosecution also claims is not duly excepted to and reserved, and can't be claimed as error, although it is excepted to in writing, and the trial judge denies in his written opinion it was error, although he himself became so well satisfied in about an hour after he gave it in charge that it was such palpable error that he withdrew it from the consideration of the jury, and has it so written down. R., p 182.

This is the point where he told the jury if they believed that defendant had proved the truth of his defense and his entire innocence of the charge; in other words that all that he got was the notary fee, then they must take his establishing the truth of his claim to discredit him by. And yet counsel for the prosecution (in his zeal we take it) tells us that errors

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which are so palpable that the trial judge himself soon becomes satisfied of them and seeks to withdraw them, and has it so noted in writing on the charge, the plaintiff in error can have no benefit for such errors as this.

The fifth assignment of error the trial judge says is not well taken; nor the 6th nor 7th, all in his written opinion on the motion in arrest of judgment.

The 8th and 9th assignments the trial court says was intended for the benefit of plaintiff in error.

The 10th, 11th and 12th grounds the trial court also overrules in his written opinion. That he should give undue prominence to the evidence of the prosecution and omit or obscure that in favor of the plaintiff in error the trial court could not see how this could be harmful error to the plaintiff in error.

It was error to overrule the motion in arrest of judgment, as was done by the trial court in the case at bar. It was error to render judgment against the plaintiff in error upon the verdict, and to sentence him thereon.

The plaintiff in error moved, upon written grounds filed, to arrest the judgment and to set aside the verdict. He tendered his bill of exceptions, embodying the motion in arrest of judgment, with the grounds therefor, and at the same time presented his assignment of errors in exactly the same words. These errors were assigned by him in the court below and made part of the record by proper bill of exceptions.

In Crain vs. United States, 162 U. S., 632, this court, by Mr. Justice Harlan, rendered the opinion, and that opinion shows that this court decided and reversed that case on the shortest kind of a statement only, made in the brief for plaintiff in error

in this court, and at the very close of the brief, "as is fully shown by an inspection of the printed record," the short statement of a few lines in the brief said.

On page 636 this court says: "But an objection is made to the proceedings in the court below which is of a serious character. The record should be a permanent memorial * * * * *and show whether the judgment whereby it was proposed to take* the life of the accused, *or to deprive him of his liberty, was in accordance with the law of the land.* P. 643.

In Hoyt vs. Utah, 111 U. S., 579, this court, observing that *the public has an interest* in the life *and liberty of an accused person*, said:

"Neither can be lawfully taken except in the mode prescribed by law. That which makes the law essential in proceedings involving the deprivation of liberty or life cannot be dispensed with or affected. * * * * * *

"Where the crime charged is infamous in its nature, are we at liberty to guess * * * and then guess again? * * *

"Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities on the subject, safety lies in adhearing to established modes of procedure devised for the security of life and liberty.

"Nor ought the courts, in their abhorence of crime nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared. Before a court of last resort affirms a judgment of conviction of at least an infamous crime, it should appear affirmatively

from the record that every step necessary to the validity of the sentence has been taken. P. 645.

"We may have a belief, * * * but this belief is not founded upon any clear, distinct affirmative statement of record, but upon inference merely. That will not suffice.

"We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively (and counsel add that no error was committed in the charge as given or refusal to charge) is not a matter of form only, but of substance in the administration of the criminal law, consequently such a defect in the record of a criminal trial is not cured, but involves the substantial rights of the accused.

"The constitution does forbid the deprivation of liberty without due process of law, and due process of law requires a trial by jury and the finding of the facts by the jury and not by the trial judge, and the record of his conviction should show distinctly, not by inference merely, that every step involved in due process of law and essential to a valid trial, was taken in the trial court. Otherwise the judgment will be erroneous and cannot be made the basis of judicial action without endangering the just and orderly administration of the criminal law. The present defendant may be guilty and may deserve the full punishment imposed upon him by the sentence of the trial court, but it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

That no error was committed in the case at bar by the trial judge in his charge to the jury and his refusal to even con-

sider or charge as requested cannot be predicated of the record here, we respectfully submit to this court.

Counsel for the prosecution on page 4 of his brief, says:

"The first assignment of error, part of the 8th and 11th, relate to a failure on part of the court to give certain instruction. As said by Mr. Chief Justice Fuller in the Agnew case, error not to have given due effect to the law and the rules of law."

It is error to give a one-sided charge; this court has so said repeatedly. It is error to omit or obscure the evidence in favor of the accused. It is error to denounce the accused and destroy his evidence, as the statute provides he may testify.

The intimations and implications and insinuations of the trial judge, as this court has said, we fear seriously trench upon that untrammelled right of the jury to pass on the facts and for the jury alone to pass on them. And the judge, to whose slightest word the jury give great weight, should be very cautious in what he says and how he expresses his opinion on any mere question of pure fact. This court has repeatedly said this. And that all these were errors, reversible errors, and errors prejudicial to the right of the accused to have the jury pass untrammelled on the facts of his case, by any opinion of trial court.

Counsel for the prosecution says our original brief is elaborate. This is true, and no one can regret it more than we do. But we respectfully submit that the fact that the liberty of a person is at stake, that this judgment as completely destroys him and brings utter ruin to his all, as though it took away his life itself, justifies us.

Five times out of seven this plaintiff in error has been found not guilt of the same charge by two juries in this very case,

and twice as to these very two men, Anderson and Bloodson, both—that he was not the attorney, agent or any other person instrumental of either of them, and that he did not withhold from either of them the very sums here specified, or any parts thereof. And it does seem to us, if there ever was a case where the verdict was against—directly against—the law and the facts, this is the one.

Where the plaintiff in error is not guilty, he is innocent—as completely innocent of this charge as anyone can be who never saw or heard of it before. Where guilt has been put upon him alone by the charge of the trial court; where he found the facts for the jury, usurped and invaded the province of the jury and found for them what the facts were, and so stated to them in his charge to them, the law should correct, and the case be reversed.

Counsel for the prosecution in his brief says there is much in our original brief that is de hors the record.

Our brief shows eight items of proof specifically called for in the bill of exceptions and not copied by the clerk of the lower court in the record. We can't see how this can be any fault of ours. We think it bears out what Mr. Justice Harlan says in the Crain case, that the court ought not to countenance the careless manner in which records of cases involving the liberty of an accused are often prepared. The exceptions taken and reserved in that part of the record showing that plaintiff in error excepted to juror Shepherd, and to the number of challenges allowed by the trial court, is not in this record. But it is no fault of ours, as we think the record shows. It is judicial knowledge that there are jurors, and the accused has a right to test their qualification, and to except to a number of them as

fixed by law—the U. S. R. S. And if he excepted to them and reserved his exceptions in that part of the record to the ruling of the court at the trial on the same, and that part is not copied in the record, it is surely no fault of ours.

The comment of the counsel for the prosecution on the 2d, 4th, 5th, 7th, part of the 8th, 9th and 10th assignments of error we have replied to beyond, and set out our argument in our original brief.

Our position in the 12th and 13th is, as counsel for the prosecution states it, that the verdict is against the weight of evidence.

JAMES M. GREER,
Solicitor for Plaintiff in Error.